THE JOURNAL
OF
POLITICAL ECONOMY

VOLUME 29 *March 1921* NUMBER 3

THE ORIGIN OF UTILITY COMMISSIONS IN MASSACHUSETTS

Occasional attacks upon commissions charged with the duty of regulating and supervising the various types of business affected with a public interest make it worth while to review the circumstances out of which these commissions developed. The situation in Massachusetts in the days before commission regulation presumably differed only in degree and not in kind from that which has existed in other states; and careful study of this situation indicates that a permanent executive agency has seemed at successive crises in the history of corporate control to be the only adequate remedy for an intolerable situation. Massachusetts offers an especially useful illustration of the breakdown of other means of public regulation, commencing with the case of the banks in the decade 1830 to 1840, and including the case of insurance companies in the fifties, the railroads in the sixties, and the gas companies in the eighties. A brief review of the essential facts in each of these cases will be followed by a review of the conditions which ultimately precipitated commission regulation.

I

For nearly a half-century Massachusetts relied on the law, strong in its own right and enforced by the private interests of

litigants, to restrain banking corporations within the limits of sound banking principles. By 1829, the General Court had developed a body of banking law which was probably the most advanced to be found within the Union at that time.[1] The legislature for many years had been conservative in the grant of new charters,[2] but the changed economic conditions consequent upon the development of manufacturing enterprise occasioned a demand for new banking facilities which could not be withstood. Yielding to the pressure, the General Court created more banks than were actually required,[3] and a period of exaggerated competition ensued which tested the means of control then possessed by the state and demonstrated the necessity of more adequate public agencies.

This period of banking activity brought into play for the first time the legislative investigating committee. From the earliest days the legislature had reserved, as the ultimate guaranty of the efficacy of the law, the right to investigate banks by special committee. These committees undertook on behalf of the legislature the function of executing and enforcing the law. When specially appointed by the legislature for the purpose they were authorized to examine into the affairs of any bank chartered by the state; if after a hearing the committee found and the legislature determined that the corporation had exceeded its powers or failed to comply with any of the rules, restrictions, and conditions provided by law, the charter of the corporation might be declared by the legislature forfeit and void.[4]

The first of such committees was organized in 1830, and as a result of its investigations, which uncovered fraudulent misrepresentation concerning their capital stock, three banks were deprived of their charters.[5] These banks stoutly maintained that the

[1] See Laws Mass., 1828, c. 96. All references to laws, documents, and reports of commissions deal with Massachusetts unless the contrary is indicated.

[2] Bank Commission Report, 1866, pp. 45–46.

[3] L. Hamilton, *Memoirs of Robert Rantoul, Jr.*, pp. 350, 354, 522; Senate Document 17, 1830, p. 29; House Document 1, 1831, p. 7.

[4] Laws Mass., 1828, c. 96, No. 17.

[5] Senate Documents 9, 17, 50, 1830. Laws Mass., 1829, c. 64, c. 104, c. 105. Owing to the double session of the General Court, these laws are properly cited as of the legislative year 1829, although they were passed in the calendar year 1830.

authority of a prevalent banking custom should be held sufficient excuse for their admitted violation of the law. Although this plea was denied, nothing further was done to investigate the alleged prevalence of illegal custom, and Governor Lincoln expressed the opinion,

> that by retaining in the government the right to require at pleasure returns of the state of the institution with the power of visitation and inquiry by committees, and a control over the charters upon any excess of authority, the means of correction may be applied upon the first appearance of mischief.[1]

A second investigation was made in 1834 which appeared to indicate that the banks had not materially altered the business methods condemned four years earlier.[2] The legislature retained confidence nevertheless in its system of control. Their committee reported: "The fact that the legislature knows and censures this oppressive practice may and it is hoped will deter the Banks from it hereafter."[3]

In 1836 the directors of the State Bank attempted to bring these investigations to an end by alleging the illegality of an examination proposed to be made into their affairs.[4] The insistence of the committee quickly broke down this opposition, and seventeen banks were subjected to special examination. The charters of the State Bank and the People's Bank were subsequently declared null and void; but at the succeeding session were restored.[5]

Most unsatisfactory results were obtained in 1837. Agitation against banks continued and the legislative committee persisted in its search for violations of the law. One committee reversed the findings of another; banks which later proved to be in unsound condition were given a clean bill of health; and a thorough investigation of the banking system was not even contemplated. It remained, however, for the revelations of 1838, following upon the panic of 1837, to complete the destruction of the usefulness of the legislative investigating committee. Ten banks were examined

[1] Senate Document 1, 1830, p. 7.

[2] See Senate Documents 50, 53, 76, 1834. [3] Senate Document 50, 1834, p. 12.

[4] Senate Documents 26, 47, 1836; L. Hamilton, *Memoirs of Robert Rantoul*, pp. 336, 350.

[5] Laws Mass., 1836, c. 283, 284; 1837, c. 100, 105; Senate Documents 45, 47, 1836; House Documents 62, 65, 1836.

in this year, and the reports which were made to the General Court indicated how completely the previous committees had failed to accomplish their task.

The most startling event in the financial world subsequent to the general suspension of payments was the failure in January, 1838, of the Commonwealth Bank, supposed to be one of the strongest institutions within the state. Its affairs appeared in a most deplorable light. Overdrafts had amounted to $194,564; and the officials of the bank were among the most persistent offenders. The New England Crown Glass Company, of which the president and a director of the Commonwealth Bank were members, created a debt with the bank, without security, for $123,000. Loans were made far beyond the capacity of the bank. Some of the directors were grossly ignorant of the affairs of the institution.[1] In other investigations falsification of returns, fraudulent loans in lieu of capital stock, illegal loans to stockholders, and a variety of other misdeeds appeared.[2] The president of the Franklin Bank could neither read nor write, except to write his own name.[3]

By 1838 it was therefore clear that the system of public regulation then provided had failed to safeguard the public interest. In spite of this means of control, banks evaded the law frequently and often with impunity, and the various investigations were useful chiefly in that they showed to what an extent the law was being violated. The weaknesses of the legislative committee as an enforcing agency are sufficiently obvious. Its supervision was necessarily temporary and intermittent; its activities were usually undertaken after the damage had been done; its members, depending on their own genius for discovery, were readily deceived. Moreover, the effects of an investigation even in the case of a bank ultimately proved innocent of transgression were liable to be disastrous. The novelty of the proceedings, their relative infrequence, the inevitable suspicion which an examination directed against a bank, the rumors which an investigation set loose were of most serious consequence.[4]

[1] See House Document 35, 1838.

[2] See Senate Documents 25, 26, 34, 35, 40, 1838.

[3] Senate Document 35, 1838, p. 24.

[4] Senate Document 58, 1837; House Document 13, 1838.

The character of the punishment which was open to the legislature was likewise inequitable. Whatever the degree of guilt disclosed, the legislature was limited to one of two courses: either to annul the charter and close the career of the bank, or to release it, chastened perhaps by its experience, but without having imposed upon it further penalty or new guaranty against future misconduct.

Influenced by these considerations, Senator Lawrence of Hampshire undertook in 1836 to crystallize opinion in favor of a permanent executive commission whose function it should be to enforce the laws of the state concerning banking by a continuous and intimate supervision of their affairs.[1] A bill creating such a commission passed the Senate in 1837 but was defeated in the House. In 1838 a bill was approved by both houses and a new system of public control of corporations, centering about a bank commission, was instituted in the state. A demand for economy and suspicion concerning the impartiality of one of the commissioners combined with partisan hostility to bring about the abolition of the Bank Commission in 1843. It was restored with amplified authority in 1851 and with changes in both structure and powers has enjoyed a continuous existence since that date.

No sooner had the bank problem thus been put in the way of solution than a similar problem loomed on the horizon in the case of the insurance companies. The decade 1820 to 1830 saw much the same enlargement in number of insurance companies as of banks, and the accelerated rate of incorporation was maintained until the Civil War.[2] Meanwhile there had come about an invasion of the state by foreign companies, which not only intensified competition for business but tended to drag the competition to a very low plane of business ethics. By 1855 the total amount of insurance outstanding in Massachusetts amounted to $525,228,820.[3]

Prior to the creation of the Insurance Commission, public control of the insurance companies rested upon the law defining their powers and duties, upon the personal liability of directors and agents, as enforced by the courts in private suits, and upon a

[1] See *Boston Daily Advertiser*, February 23, 1837.

[2] *Sixth Annual Report Insurance Commissioner*, p. 14.

[3] *Third Annual Report Insurance Commissioner*, p. 5.

régime of publicity designed to acquaint both legislature and people with the real condition of each company.[1] Foreign companies were subject to regulations of the same nature, but rather more drastic in scope. It is to be observed that there was no special law-enforcing agency. The legislative committee, which from 1830 to 1837 had been so active on behalf of the General Court in applying the law to the delinquent banks, never became a working instrument of the state to control the insurance companies. It may be surmised that the experience of earlier years with this committee was sufficient to foreclose its later use.

This system of control in turn failed to meet the demands of the time. The law itself fell into such a confused and uncertain condition that both insurance companies and public officials were unable accurately to define the powers and responsibilities of the business.[2] No adequate protection could be found under this system of control against fraudulent and illegal insurance, especially by foreign companies. The state was overrun with a class of itinerant insurance agents, in open and defiant disregard of the laws of the state, whose only object was to secure their own commissions. The companies for which they acted were in most instances no more honest than their agents. Being themselves aware of the utter worthlessness of their policies, they of course were willing to issue them at less rates than responsible companies could and until the bubble burst parties seeking insurance would naturally choose the cheapest.[3]

The General Court was led astray by an undue confidence in competition as the automatic regulator of business enterprises, and in order to insure competition proceeded to incorporate in ever-increasing numbers. In the five-year period from 1851 to 1855 no less than seventy companies were authorized to write insurance, in addition to the foreign companies which were pouring into the state. The insurance commission reported in 1855: "An unhealthy and reckless competition in the business of insurance, in

[1] See Laws Mass., 1854, c. 453.

[2] Senate Document 17, 1853; General Court Documents, 1854 (unnumbered series); *Second Annual Report* (ex officio) *Insurance Commission; First Annual Report Insurance Commission*, p. 4.

[3] *Third Annual Report Insurance Commission*, p. 14.

this as well as in other states, has tended to render the public less safe and the business less respectable."[1]

The courts were constantly being called upon to compel delinquent companies to perform the terms of their contracts. Although some satisfaction was obtained at their hands, judicial control proved inadequate. Complaints were directed against mutual companies in particular of evasion of justice by use of the technicalities of judicial procedure. Many preferred to settle on the terms of the corporation rather than subject themselves to the uncertainty, delay, and anxiety involved in the succession of appeals in which the company was only too likely to indulge. In the case of foreign companies it was difficult until 1854 to serve judicial writs. The company was represented by no responsible official whatever in the state, and the agent, when he could be found, frequently was some needy fellow against whom suit was useless.

A long series of frauds and irregular practices culminated in the exposure of the Metropolitan Fire and Marine Insurance Company, the People's Mutual Fire Insurance Company, the Massachusetts Mutual Fire and Marine Insurance Company, and the Appleton Insurance Company. The evidence uncovered in these cases shows clearly how far the legislature had failed to keep the insurance business in a healthy condition under the system of control in existence before the Insurance Commission took up its work.

By means of barefaced fraud at the inception of the Metropolitan Company, it started without any capital, although supposed to have $200,000 paid in and invested in accordance with the law. The president finally absconded with the available assets. The causes of insolvency were stated to be fraud in the management of its funds, reckless extravagance in its expenses, the extended field of its operations, and the failure of many of its agents to account for the premiums received by them.

> The accounts, investments, and business transactions have been kept with so little regard to accuracy and truth that it has been difficult and perplexing to follow through its wicked and eventful history. . . . . In its inception, its history, in illegal transactions and gross violations of the law, in shameless fraud and wanton deception, it has developed a system of financial corruption almost without a parallel.[2]

[1] *First Annual Report Insurance Commission*, p. iv.

[2] *Ibid.*

Inquiry into the People's Company revealed considerable funds for which no account could be given, a total of $66,000 unpaid losses, violation of the law concerning the election of treasurer and classification of property insured, and a collusive reinsurance of over $1,000,000 risks of the first class. This entry was found in the company records: "That the Directors . . . . be provided with an excursion down the harbor, at such time as the President shall designate." The Insurance Commission concluded their review of this case as follows:

> The payment of salaries disproportionate to services rendered, the extravagant allowances in commissions to agents and for the collection of assessments, the unjustifiable and unavailing practice of resisting by litigation, the claims for losses, the careless and insecure management of its funds, have contributed quite too much to its present embarrassment.[1]

The officers of the Massachusetts Mutual Company seemed to have been "wholly unfit, either by knowledge or business tact, to manage an institution, requiring the exercise of the best judgment and largest experience." The Appleton Company appeared to be a corporation organized to take over the risks and business of a fraudulent and insolvent company recently dissolved by act of the legislature.

The necessity for more effective regulation of the insurance business which these disclosures revealed was emphasized by the growing interrelations of the various types of business corporations one with another. Insurance companies held much bank and railroad stock, banks invested in insurance companies and made loans to railroads, until all three classes of corporations became financially integrated. Depression or failure in one business affected the standing of the others; and the protection which was then afforded by law to the banking business stood in danger of being destroyed by the extravagance of the insurance companies.[2]

The evidence drawn from the circumstances leading to the creation of the Insurance Commission thus confirms the conclusion reached by the study of the Bank Commission. In both cases a period of state control consisting essentially of legislation, with

[1] *First Annual Report Insurance Commission.*

[2] *Third Annual Report Insurance Commission.*

some attempt to secure publicity, enforced by private suit in the courts, led to failure to observe the law, abuses of management, fraud, and deception. The circumstances leading to the establishment of the Railroad Commission, while illustrating the inadequacy of such a system of control, involve a somewhat different set of considerations.

In dealing with the railroads the General Court relied to some extent on county commissioners, mayors, and selectmen, and in isolated cases on *ad hoc* commissions. Their functions were, however, of secondary importance; and in matters of the first importance the legislature relied on itself. By 1869 over a thousand statutes, general and special, had been passed to define the legal position of the railroads.

The essence of this mass of legislation is found in three provisions, one dealing with rates, a second reserving the right of the state to purchase, the third reserving power to alter or amend the charter of the corporation. The railroads were authorized to levy such rates as they chose subject to the authority of the legislature to alter or reduce them, provided, however, that the rates were not thus reduced so as to produce less than 10 per cent per annum. On what basis the 10 per cent was to be calculated no information is given.[1] The legislature reserved the right to purchase the roads after the expiration of twenty years upon payment of a sum sufficient to equal the amount of capital paid in, together with a net profit of 10 per cent thereon per year.[2] By an act passed in 1831, power to amend, alter, or repeal charters thereafter granted was reserved to the legislature.[3]

To these elements of the railroad régime prior to 1869 should be added the elaborate requirements for publicity; from 1836 annual reports were required of the railroads, and these became increasingly broader in scope and more definite in particulars.

What were the results in the railroad world of a system of public regulation essentially similar to that formerly applied to banks and insurance companies? The same confusion in the state of the law which hampered the Insurance Commission obstructed

[1] Revised Statutes, 1836, c. 38, sec. 83.

[2] *Ibid.*, sec. 84.

[3] Laws Mass., 1831, c. 81.

the Railroad Commission. The tax commissioner was unable to obtain information concerning charters supposed to be in existence. Private interests obtained charters not for construction but for speculation. The work of the legislature and its committees was very seriously affected by the necessity of considering and passing an enormous number of railroad bills.[1]

Another significant outcome was the development of a powerful and persistent railroad lobby.[2] Mr. Charles Francis Adams, Jr., referred to this railroad influence at the time in the following words:

> Everyone has an idea of the system of legislative influence and control which the railroads have developed. They are regularly represented by their directors, attorneys or agents, in every Congress and in each state legislature. One consequence of this has been the growth of a most corrupt system of legislative manipulation and log-rolling. Alarming illustrations might be drawn from the recent history of Massachusetts.[3]

The guaranty of 10 per cent profits coupled with immunity from rate interference so long as the railroads limited themselves to not more than this return seems to have co-operated with other causes to produce an unprogressive management of some lines.[4] The railroad managers in Massachusetts as early as 1854 were alert to the danger of legislative interference,[5] and in order to avoid any such possibility were content to maintain a uniform and limited amount of traffic which netted only the legal maximum return. But a small amount of traffic tended to require a high rate per unit; and the demands of an expanding business played havoc with a stationary railroad policy. Complaints multiplied, but produced so little effect that merchants shipped their goods by devious routes rather than endure the delays and high rates experienced on certain of the main arteries of communication.

[1] *First Annual Report Railroad Commission*, pp. 44–45; *Second Annual Report Railroad Commission*, pp. vi–viii.

[2] Senate Document 360, 1869.

[3] C. F. Adams, Jr., "Railway Problems in 1869," in *North American Review* X, 126, 127.

[4] See on this point Senate Document 57, 1851; House Document 125, 1853; House Document 330, 1866; House Document 181, 1867; Boston City Documents 22, 1867; C. F. Adams, *op. cit.*

[5] See *Journal of the Proceedings of the General Railroad Association*, November 23, 1854, p. 17.

Complaint was likewise entered on unfair discrimination in rates especially as between local and through rates. These complaints were confirmed by committees of the legislature.[1] There was also an opinion that rates were on the whole too high, although this phase of the rate question did not receive much discussion.

These general consequences of the existing plan for controlling the railroads, which were tending in the direction of an administrative board, were emphasized by the experiences of the state in loaning money to the railroads and in undertaking the construction of the Hoosac Tunnel. The credit of the state, first extended in behalf of railroad corporations in 1837, was employed within the next four years to an amount of over $6,000,000.[2] The opposition of Governors Morton and Davis sufficed to bring this period of state aid to an end in 1841; but in 1854 the General Court granted $2,000,000 to the Troy and Greenfield to aid in the construction of the Hoosac Tunnel. By a series of authorizations, over $3,300,000 had also been voted by various towns and cities to assist railroad construction; and in 1869 towns of less than 12,000 inhabitants were authorized to subscribe in aid of railroads a total amount of $22,000,000, of which sum over $2,300,000 had been applied by the end of 1870.[3] The state thus had a financial stake which it was bound to protect, and it cannot be doubted that this motive was permanently at work driving the legislature to a stricter and stricter supervision of the roads.[4]

In 1861 irregularities appeared in the payments made to the Troy and Greenfield road, suspension of work followed, and the state eventually was forced to undertake completion of the project on its own account, or lose both the three-quarters of a million dollars already advanced and the longed-for additional connection with the West. Faced with this alternative, the General Court authorized public construction; and there followed four years of tunneling under the direction of a state engineer, marked by heavy

[1] House Document 330, 1866; House Document 181, 1867.

[2] House Document 114, 1866.

[3] *Second Annual Report Railroad Commissions*, pp. viii–ix.

[4] See for an early expression of this view the address of Governor Morton, House Document 9, 1840.

expense, unsatisfactory progress, discouraging delays and accidents. The remainder of the work was finally turned over to private contractors in 1868. The experience of the state with the Troy and Greenfield eliminated as a possible solution of the railroad problems in Massachusetts the plan of public construction and operation then vigorously advocated by Josiah Quincy.

The entanglement with the Boston, Hartford, and Erie completed the demonstration of the necessity for more effective public control. This road appeared before the General Court in 1867 praying for assistance in completing its connection with the West.[1] Mr. Charles Francis Adams had not yet taught the legislature the true interest of the state in its railroads,[2] and the General Court was easily persuaded to loan credit to this optimistic applicant. Soon, however, ugly rumors began to be heard, and in the spring of 1869 it became apparent that the funds of the company, obtained in part from the Commonwealth, were being used for speculative and fraudulent purposes. The attorney general, at a public hearing, described items of "legal expense" amounting to $355,000; payments to the Erie Company of over $700,000 for "items which were mostly corrupt and criminal"; losses incurred by purchasing its own stock in a fraudulent attempt to maintain its value on the stock exchange of over $1,500,000; allowances to Farwell and Company of $967,000 for losses incurred for the company in the same project; salaries to directors, forbidden by law, amounting to $160,000; items of about $500,000 spent in corruption and bribery in New York City in securing contracts from the Erie Railroad and in bringing about the election of J. S. Eldridge (then president of the Boston, Hartford, and Erie) as president of the Erie road.[3] A majority of the committee of the General Court were nevertheless captured by the argument of Richard A. Dana for the bondholders. Mr. Dana asked: "Will it alter the export trade of Boston that the ephemeral officers of the road have not done well?" Still under the spell of the western traffic, the

[1] House Document 299, 1867.

[2] See *First Annual Report Railroad Commission* for his remarkable analysis of the railroad question in Massachusetts.

[3] Senate Document 133, 1870, Appendix, Argument of the Attorney General.

General Court actually voted further sums to replace those squandered by the officers of the company. The bill was, however, promptly vetoed by Governor Claflin.

Certainly the most remarkable feature of this affair is the willingness of the legislature to become the adjunct to the speculation and fraud which characterized the proceedings of the Boston, Hartford, and Erie. Blinded by its overwhelming ambition to capture the western trade, the legislature proved to be a ready tool for the managers of the railroad. Had the veto of the governor not been effective, the precedent then established could not have failed to become disastrous.

No incident shows more clearly the ineptitude of the legislature in its dealings with the railroad corporations. The directors were able to hoodwink the General Court, to defy it, and to manipulate it. The highest organ of the state stood in a fair way to become a pawn in the moves of railroad promoters. The creation of the Railroad Commission in 1869,[1] after a persistent and continuous struggle of five years, relieved the legislature of this dangerous pressure and established a system of control which had already demonstrated its superiority in the case of the banking and insurance corporations.

It remains to observe briefly the circumstances leading to the creation of the Gas Commission in 1885. From 1855 to 1870 the gas companies possessed a monopoly so long as their dividends for a period of five years did not exceed 7 per cent.[2] After this legalized monopoly privilege had been withdrawn, custom and tradition still dictated a practical monopoly, although the question of competition was agitated from time to time.[3]

The monopoly thus enjoyed by the established companies was suddenly threatened about 1880 by the development of electric lighting, and by the application of a new and more efficient process for making gas, known as the water-gas process. The older companies, which used the coal-gas process, had secured in 1880 the passage of a law forbidding the sale of gas containing more than

[1] Laws Mass., 1869, c. 408. [2] Laws Mass., 1855, c. 146; 1870, c. 353.

[3] See for typical discussions of this question Boston City Documents, 61, 1854; 41, 42, 1860; 116, 1866; and especially the report of the Choate Committee, 91, 1876.

10 per cent of carbonic oxid. The effect of this law was to bar the water-gas companies from the state. The Consumers' Gas Company, a water-gas concern, undertook in 1884 to secure the repeal of this legislation; both groups of companies maintained a powerful lobby at the capital, and after an exciting conflict, the water-gas advocates were defeated by a tie vote in the Senate. Meanwhile the coal-gas monopoly was saved from competition in the streets of Boston only by the mayor's veto. For the moment the water-gas manufacturers were balked, but the fighting had been much too heavy for the coal-gas companies to withstand another encounter.

Protection against the competition of electricity was to some extent secured for the gas companies by receiving permission from the General Court to engage in the electric-lighting business themselves. Protection against the water-gas companies was sought in another direction. The coal-gas companies now appealed to the state itself for protection, and as a part of the bargain offered to subject themselves to a control from which they had hitherto been almost completely free.[1] Mr. Malcolm M. Greenough, superintendent of the Boston Gas Company, discussed the situation with candor before the New England Gas Association in 1885. He said:

> The proposal for a Commission is practically this, if amended as proposed by us—that no company which shows its figures, and accedes to the recommendations of the Commissioners, shall be troubled by competition; for the assent of the Commissioners must be given to enable the institution of a rival works, and that permission would not probably be obtained.[2]

The gas companies themselves were thus driven by stress of competition to seek protection from the state and to grant in return powers of public supervision. Gas consumers, on the other hand, were becoming vocal in demanding supervision as the contrast between the position of the gas companies and of the banks, railroads, and insurance companies penetrated the public mind. In 1866 the Boston Gas Company had refused point-blank to disclose the cost of manufacturing a thousand feet of gas;[3] and in

[1] See *American Gas Light Journal*, XLII, 117.

[2] *Ibid.*

[3] Boston City Documents, 116, 1866, p. 7.

1885 this essential information was still closely guarded by the gas-company officials. In 1876 the Choate Committee asserted that the public interest in the proper and economical management of gas companies was of precisely the same nature as in the management of railroad companies, and pointed out that, being monopolies, they were liable to be conducted arbitrarily and in a manner to injure and abuse.[1] This commission made a strongly reasoned statement in favor of a state gas commission with powers similar to those exercised by the Railroad Commission. In 1880 the petition of the mayor of Cambridge for the establishment of a gas commission was referred to the next General Court.

The struggle for and against water-gas manufacture to which reference has been made brought about an investigation of the opposing lobbies which sought to control the action of the legislature on this issue.[2] This investigation, which revealed a powerful and active lobby in very close connection with certain senators, played a useful part in crystallizing public opinion in the demand for effective regulation. This demand of the gas consumers and the contemporary demand of the coal-gas companies for protection against competition were both satisfied in 1885 by the passage of the act creating the Gas Commission.[3]

II

The failure, successively, of legislative direction of the banks, insurance companies, railroads, and gas companies was due to a variety of causes, some general, others special. Among the general causes which defeated the early attempt of the General Court to secure obedience to the law may be enumerated, first, the low tone of business morals prevalent in Massachusetts in the ante-bellum period.

This was a transition period; the old code of morals which regulated the business intercourse of an earlier generation did not seem to fit the emerging world of great business enterprises, of diffused responsibility, and of extended operations. Business

[1] Boston City Documents, 91, 1876, pp. 52 ff.

[2] Senate Document 363, 1884.

[3] Laws Mass., 1885, c. 314.

conducted within the limits of a single county felt restraints of a personal nature which disappeared when the limits of the state gave way to enterprise on a nation-wide basis. The investigation of 1838 uncovered a tale of deception, evasion, and fraud which must have confirmed the quavering protests of the elders who looked back to an earlier and purer age. Fifteen years later witnessed another revelation of business practice in insurance which exhibited a moral tone far below what the statute book assumed to prevail.

The willingness to take advantage of the occasion to profit at any expense was encouraged, in the second place, by the confused and involved condition into which the statute book fell as the General Court strove to keep abreast of the times. The insurance companies could rightly complain that, when the law was so vague, or intricate, or contradictory, it was a hardship to expect them to abide faithfully by its terms. The railroad law comprised over a thousand statutes by 1869; and in the midst of this maze the managers thought with some justification that they could make their way without fear of disturbance.

The enforcement of some sections of the revised statutes would have been moreover nothing short of a blunder. For instance, the General Court, in order to secure that banks should always be prepared to pay their outstanding notes in specie, provided a penalty of 24 per cent interest to be collected by the holder of bank notes during the period when specie payment was refused. Had this law been enforced during the suspension of 1837–38, the banking business would have been irretrievably ruined. For many years, railroads were required to permit any person or corporation to run their private conveyances over any line of track, a rule the enforcement of which would have been productive at the best of extreme confusion and danger. The legislature was effectively prevented by its own statutes from being able to purchase the railroads within the state. The enforcement of other parts of the general laws actually produced the most unfortunate results. Thus the promise that the legislature would not interfere to control rates of railroads as long as profits remained under 10 per cent, instead of insuring low rates, guaranteed an unprogressive service. The law prohibiting the manufacture of gas containing more than

10 per cent of carbonic oxid, while protecting the people against what was then supposed to be a dangerous article, at the same time strangled water-gas competition and effectively safeguarded the established monopolies. The unshaken reliance on competition as the automatic regulator of business prompted the General Court to incorporate too many banks, insurance companies, and railroads. This overincorporation set in motion an exaggerated competition which brought out the worst features of the standard of business morals to which reference has been made.

Examination of the various law-enforcing agencies upon which the state formerly relied discloses a number of special reasons which led to their abandonment successively in favor of permanent executive commissions. The appeal to the courts to sustain private rights was defeated by the superior resources of powerful corporations in prosecuting appeals, securing delay, and wearing out the patience of their opponents.

Where public interests were at stake the courts were even less effective. Against poor management which resulted in the hazardous condition of a bank there was no effective judicial remedy. Either a case could not be brought to the court, or the parties who should have taken action were the foremost in desiring to cover up the situation. Thus unsuspecting investors and creditors lost their investments and debts; and when the loss was finally discovered, it was too late to hope for recovery. The remedy provided by law was annulment of the charter by the General Court. But such annulments were so irregular that their effect on making the remaining banks conform to the law was very slight. Particularly difficult was it to assert the authority of the state through judicial process over foreign insurance companies which sent their agents into the state in reckless defiance of the laws. Public policy demanded special safeguards in the case of such companies to give protection against fraud and misrepresentation, and to insure adequate remedy for any delinquencies. These safeguards lost most of their value through the extreme difficulty in part of discovering the trouble until too late, and in part of prosecuting a foreign company which proved to be without any available resources. The early reports of the insurance

commission show how completely the law had fallen into disrepute among the foreign corporations.

These illustrations will serve to indicate that reliance on the courts for the enforcement of the law, either in the matter of private rights or of public interests, was insufficient to compel strict obedience to the law.

The General Court consequently made use of other expedients. Of these the first in point of time was the legislative investigating committee, which after a long period of quiescence became active in the decade 1830 to 1840. This decade stands in the infancy of public regulation, and the theory on which its law-enforcing agencies rested had never been really tested. That theory presupposed an active legislature prescribing rules for the conduct of enterprises of all sorts in so far as the need for regulation was felt to exist. The legislative rule was supposed to be maintained primarily by the force of an alert public opinion. Only in the case of the banks, the power of which was recognized at an early date, was any special enforcing agency thought necessary, and in this instance the machinery provided rested directly on the idea that if publicity were once assured it would be in the great majority of cases wholly adequate. To insure publicity the legislative investigating committee had long been the weapon standing in the public arsenal. This, it should be noted, was not a standing committee but one set up in each particular case for a given investigation. As the ultimate means of correction upon the face of such information as the committees secured, there existed the power of the General Court to declare null and void the charter of the corporation.

These committees were most in evidence during the years preceding and following the panic of 1837. As soon as they began to function on an important occasion it became apparent that they were wholly inadequate to insure law enforcement. The committee was unable to function fully half the year while the General Court was not in session; it was formed only in case such serious reports came to the ears of the legislature that a majority were convinced investigation was necessary; the investigations were so infrequent that they exerted no permanent and steady influence;

they were carried out in a haphazard fashion which frequently failed to get at the facts; they caused irreparable damage to innocent institutions which were visited on the basis of false rumors; they took up a valuable share of the time of members of the General Court in performing a duty which should have been left to other branches of the government. So unsatisfactory were the results that never again after the bank investigations of 1838 did the legislature resort to this type of committee.

Another important expedient to which the General Court made resort in order to secure compliance with its laws was a regular system of reports, in addition to the irregular investigations of the legislative committees. The banks, the insurance companies, and the railroads were all required to make annual reports to the state and to give any additional information in special reports. Much attention was given by the General Court to the form of these reports and from time to time they were elaborated and made more stringent. Although other use was made of them, one of the main objects for which they were exacted was to determine whether or not the law had been complied with. The theory on which these requirements were made was sound enough, but the technique of report-making had still to be hammered out through long experience. Every commission under discussion in this study referred to the inadequacy of the form of report required, stating that from the returns demanded no one could tell whether a company was in sound financial condition or not. These reports were not regularly filed by the companies concerning which the most need for information existed; and, once made, they were subject as a rule to no examination to test their accuracy, to ascertain the condition of the company or its compliance with the law, or to determine what additional legislation, if any, was necessary. The publicity feature of public regulation failed to achieve its purpose until an agency had been created to use the information disclosed.

The gas companies for many years were subject to town and city authorities to a peculiar degree. Curiously enough, the legislature never was active in exerting its restraining influence over the gas companies; no committees of the General Court made wholesale investigations; even annual reports were not required

until 1885. Rather the legislature stretched a protecting arm around these corporations, granting them a practical monopoly for well over half a century. The local authorities, however, were invested with the power to refuse admission to any or all gas companies, and also the power to regulate, restrict, and control any act of the companies which affected the health, safety, convenience, or property of the inhabitants of the town or city.

Acting on the theory that the local officials would be more capable of dealing with such matters, the General Court thus transferred its supervisory power to them. The practical results of the exercise of this regulating function by the selectmen or by the mayor and aldermen were not satisfactory. The power to admit or refuse admittance to competing companies threw the city governments into the midst of the whirlpool of gas politics; and from the point of view of sound municipal government it was extremely unfortunate to submit city councils to the tremendous pressure which the gas interests could bring to bear. The uncertainty that any decision of a city council would stand between sessions caused even the companies themselves to desire to have this power removed to higher places.

It should be noted at this point that the problem of law enforcement which looms so large in the case of the banks, the insurance companies, and the railroads was a co-operating, but not the controlling, factor in bringing about the creation of the Gas Commission. In this latter case there did not exist even the defective system of control which legislation had provided in the former; the controlling factor in the establishment of the Gas Commission was clearly the fear of competition with which the coal-gas companies were faced after 1880. On the side of the people there was, however, a widespread conviction that the unrestrained monopoly power of gas corporations was resulting in high rates and enormous profits at the expense of a helpless consuming public. The very secrecy of the gas companies was not only resented, but helped to fan the supposition of extortion into a burning conviction. The demand of the public was therefore for an adequate measure of state control. The railroad situation in the years immediately before 1869 showed to some degree this same hostility to monopoly;

and the awakening consciousness of the power of these corporations must have been greatly accentuated by the repeated defeats by the railroads of the attempt to subject them to effective public control.

The General Court consequently discovered in the course of a long and varied experience that to secure obedience to the law was a more difficult problem than it had supposed. The traditional Anglo-Saxon reliance on the courts turned out to be inadequate; the legislative investigating committee backed by the power to annul the charter of a law-breaking corporation proved to be a failure; and the persistent attempts to secure publicity came to full fruition only when additional means had been supplied in the executive board to make use of the information secured.

LEONARD D. WHITE

UNIVERSITY OF CHICAGO